SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 368

MICHIGAN GAS AND ELECTRIC COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION,
MICHIGAN WISCONSIN PIPE LINE COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF MICHIGAN WISCONSIN PIPE LINE COMPANY IN OPPOSITION

CHARLES V. SHANNON
LOUIS FLAX
May, Shannon and Morley
1700 K Street, N.W.
Washington 6, D. C.
Attorneys for Michigan Wisconsin Pipe Line Company

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OPINIONS BELOW

The opinion and orders of the Federal Power Commission (R. 339-397, 428-447) are reported at 22 F.P.C. 775 and 22 F.P.C. 1157. The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 1a-5a) is reported at 290 F. 2d 374.

JURISDICTION

The judgment of the Court of Appeals was entered on April 20, 1961 (Pet. App. 1b). A petition for rehearing en banc was denied on June 1, 1961 (Pet. App. 1c). The petition for a writ of certiorari was filed on August 30, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the Court below erred in affirming the Federal Power Commission's finding that a distribution company's demand that a natural gas pipeline be required to construct certain additional facilities for service to new markets or provide an equivalent differential in rates would discriminate against the pipeline's other customers.

STATUTES INVOLVED

The Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U.S.C. 717 *et seq.*, provides in pertinent part as follows:

> "Section 4(b). No natural-gas company shall with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service."
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> * * * * * * * * *
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> "Section 7(a). Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public inter-

est, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers."

STATEMENT

Michigan Wisconsin Pipe Line Company is an interstate pipeline company which transports natural gas from Texas and Oklahoma to points in Michigan and Wisconsin, where it sells the gas to distributing companies for resale to consumers in the area. In February of 1959, Michigan Wisconsin entered into an agreement with Midwestern Gas Transmission Company to purchase 158,000 Mcf per day of natural gas to be imported by Midwestern from Canada and transported through a proposed new pipeline from the Canadian border to central Wisconsin. In order to receive the Canadian gas into its system, Michigan Wisconsin proposed to construct a large diameter extension of its existing pipeline facilities in Wisconsin to connect with Midwestern's new line near Marshfield, Wisconsin (R. 301-312).

The new Canadian supply was needed by Michigan Wisconsin principally to augment deliveries to its existing customers. However, in accordance with long-standing commitments and to carry out the suggestions contained in an earlier decision of the Federal Power Commission regarding service to new markets in the area,[1] Michigan Wisconsin formulated a project that would also provide natural gas to a number of new communities in central Wisconsin in the vicinity of its proposed new trunk line to Marshfield. Michigan Wisconsin's project also contemplated construction of a pipeline northeast from Waupaca, Wisconsin, to Menominee, Michigan, the gateway to the Upper Peninsula of Michigan, and service to the communities adjacent to that line (R. 204).

Michigan Wisconsin's proposed service to Menominee and the communities in Wisconsin presented no question as to economic feasibility. However, service to the widely-scattered and distant communities in the Upper Peninsula, including the construction of the necessary pipeline facilities extending north from Menominee, presented serious economic problems. These problems were accentuated by the fact that two-thirds of the total firm load in the Upper Peninsula is represented by one customer, Cleveland Cliffs Iron Company, which would use gas in the beneficiation and pelletizing of iron ore (R. 10-11).

Petitioner, Michigan Gas and Electric Company, distributes manufactured gas in three communities and has franchises to distribute gas in four other communi-

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[1] *American Louisiana Pipe Line Company, et al.*, 20 F.P.C. 575 (1958).

ties in the Upper Peninsula. Upon concluding its agreement with Midwestern for an additional gas supply, Michigan Wisconsin accordingly approached Petitioner with an offer to provide natural gas to Petitioner for service to the Upper Peninsula communities. Michigan Wisconsin proposed to provide city gate service in the Upper Peninsula at a rate which would reflect its uniform system-wide rate at Menominee, Michigan, plus the additional cost of service associated with the facilities required to transport the gas from Menominee to the various delivery points in the Upper Peninsula. Alternatively, Michigan Wisconsin offered to sell gas to Petitioner at Menominee at Michigan Wisconsin's system-wide rate if Petitioner desired to construct and operate the Upper Peninsula transmission system (R. 56-57).

Petitioner rejected both proposals and demanded city gate deliveries by Michigan Wisconsin at each community in the Upper Peninsula at a rate substantially lower than that necessary to recover the cost of transporting the gas from Menominee. This would have thrown the costs of the pipeline facilities in the Upper Peninsula upon Michigan Wisconsin's other customers. Since Michigan Wisconsin felt that this would be unfair and discriminatory to its other customers, it refused to agree to Petitioner's demands (R. 57-58).

However, because of the strong public interest in extending natural gas to the Upper Peninsula, Michigan Wisconsin asked Michigan Consolidated Gas Company, the largest gas distributing company in Michigan, whether that company "could conceive a means of putting together an economic project to get gas to

the Upper Peninsula" (R. 110-111).[2] Michigan Consolidated then formulated a proposal under which it would purchase gas at Menominee from Michigan Wisconsin at the latter's uniform system-wide rate and build the necessary facilities to transport and sell the gas to Petitioner and to the municipal gas system of Escanaba, Michigan, at their "city gates" and to Cleveland Cliffs.

The rates proposed by Michigan Consolidated for firm service to Petitioner, Escanaba and Cleveland Cliffs were calculated to provide less than a 6 percent rate of return to Michigan Consolidated on its facilities in the third year. Michigan Consolidated was willing to accept this relatively low rate of return and the risks inherent in service to the Upper Peninsula in order to make the benefits of natural gas service available to the Upper Peninsula. Its proposal was designed to make it possible for Cleveland Cliffs to purchase gas on a basis competitive with other fuels and for Petitioner and Escanaba to resell the gas to their consumers on an economic basis (R. 10-14).

While the City of Escanaba signed a contract with Michigan Consolidated, and Cleveland Cliffs indicated

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[2] Michigan Consolidated, which distributes natural gas in Detroit and other communities throughout the Lower Peninsula of Michigan, is the largest customer of Michigan Wisconsin. Both companies are wholly-owned subsidiaries of American Natural Gas Company, a registered holding company under the Public Utility Holding Company Act of 1935.

It was essential that Michigan Wisconsin immediately file an application to construct the facilities necessary to accept and transport the Midwestern gas in view of the provision in Midwestern's contract with Trans-Canada permitting cancellation if a certificate were not issued by November 1, 1959 (R. 336). The certificates were issued on October 31, 1959 (R. 339).

its satisfaction with the proposal, Petitioner refused even to consider purchasing gas from Michigan Consolidated (R. 16-17).

In order to present to the Commission a concrete proposal for service to the Upper Peninsula, Michigan Wisconsin provided in its certificate application, filed April 15, 1959, for a line to Menominee, with sufficient capacity to supply the volumes of gas needed by the Upper Peninsula and requested authority to deliver up to 37,200 Mcf per day to Michigan Consolidated for service to Petitioner, Escanaba and Cleveland Cliffs in the Upper Peninsula (R. 301-312). At the hearings on its application Michigan Wisconsin showed that its proposed line to Menominee would be considerably smaller in size if service to the Upper Peninsula were not to be provided and that the additional cost to Michigan Wisconsin of constructing the larger capacity line to Menominee for that service is $2,377,194 (R. 376). Michigan Wisconsin's policy witness repeated on several occasions its willingness to sell gas to Petitioner at Menominee on the same basis as the proposed sale to Michigan Consolidated if Petitioner was willing to construct the necessary pipeline facilities in the Upper Peninsula (R. 57, 64).

Michigan Consolidated in turn presented extensive evidence as to the economic feasibility of its proposal, although it recognized that the proposal would not be feasible if Petitioner continued to refuse to purchase gas from Michigan Consolidated. Evidence was also presented showing that Petitioner could earn a return of between 6 percent and 7 percent under Michigan Consolidated's proposal (R. 298).

Petitioner, which had intervened in the proceedings, flatly announced that it would not purchase gas from Michigan Consolidated and that the latter therefore did not have a project (R. 16). Petitioner then demanded that Michigan Wisconsin be ordered by the Commission to deliver gas to Petitioner on one of two bases: (1) that if deliveries were to be made at Michigan Wisconsin's system-wide rate (known as the "AC'Q rate"), Michigan Wisconsin should be ordered to construct the major portion of the pipeline from Menominee north into the Upper Peninsula at a cost of $4,455,950 in addition to the $2,377,194 Michigan Wisconsin would invest in providing capacity in the line to Menominee for Upper Peninsula service; or (2) that, if deliveries were to be made to Petitioner at Menominee, Michigan Wisconsin be ordered to adopt a new DC'Q Rate Schedule applicable solely to Petitioner under which Petitioner would be able to purchase substantially larger volumes of gas on an annual basis and at a substantially lower average rate than that available to other customers of Michigan Wisconsin (R. 373-379).

Petitioner's first proposal was based on its claim that, in order to avoid discrimination against Petitioner, Michigan Wisconsin should be ordered to construct the additional pipeline facilities north from Menominee in compliance with the so-called "10¢ formula," which Michigan Wisconsin and the Commission had used from time to time in testing the economic feasibility of constructing comparatively short laterals to serve small communities located near its main pipeline. Petitioner's second proposal was nothing more than another demand for a subsidy from Michigan Wisconsin's other customers because of the cost to Petitioner of transporting the gas from Menominee to the markets in the Upper Peninsula.

After receiving briefs and hearing oral argument, the intermediate decision procedure having been waived, the Commission issued its Opinion No. 331 and order of October 31, 1959 in which it authorized Midwestern and Michigan Wisconsin to construct and operate the facilities proposed in their respective applications (R. 339-397).

With respect to the Upper Peninsula, the Commission found that Michigan Consolidated's proposal was economically feasible but that in view of Petitioner's refusal to buy gas from Michigan Consolidated, the proposal could not be approved. The Commission accordingly denied the portion of Michigan Wisconsin's application under Section 7(c) of the Act which requests authority to sell gas to Michigan Consolidated at Menominee for service to the Upper Peninsula. Pursuant to Section 7(a) of the Act, the Commission ordered Michigan Wisconsin to deliver up to 37,200 Mcf per day to Petitioner (rather than to Michigan Consolidated) for service to the Upper Peninsula and, accepting the recommendation of its Staff, the Commission directed that such deliveries be made at Menominee at the same rate and under the same terms and conditions of service as apply to all other customers of Michigan Wisconsin (R. 374-376).

In rejecting Petitioner's request that Michigan Wisconsin be ordered to construct the major portion of the pipeline facilities in the Upper Peninsula at an additional cost of $4,455,950 the Commission found that the 10-cent formula is not applicable to requests for service to new markets located in an entirely new area and requiring the construction of extensive transmission fa-

cilities by Michigan Wisconsin (R. 373-376).[3] Apart from the question whether it wound have statutory authority to require Michigan Wisconsin to construct such facilities,[4] the Commission found that to do so would place an undue burden upon Michigan Wisconsin and its other customers. In rejecting Petitioner's alternative proposal under which Michigan Wisconsin would be required to adopt a new DCQ Rate Schedule to cover its sales to Petitioner at Menominee ,the Commission found that such a proposal would be discriminatory against Michigan Wisconsin's other customers who would be entited to the same differential in rates and was otherwise inappropriate (R. 374-376).

The Commission further found that Petitioner could purchase gas at Michigan Wisconsin's uniform system-wide rate at Menominee as provided in the order here under review and provide service to the Upper Peninsula on an economically feasible basis provided Petitioner obtained a satisfactory long-term contract with Cleveland Cliffs (R. 378-379).

Petitioner filed an application for rehearing in which it advanced a third alternative under which Michigan Wisconsin would be required to share the costs of the transmission facilities for the Upper Peninsula serv-

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[3] Under this formula the extent of the investment to be made by Michigan Wisconsin in such short laterals is computed by multiplying the estimated annual firm sales in the new community in the third year by 10¢ per Mcf and dividing the result by 15% to cover a return of 6%; income taxes of 3%; general taxes of 1.5%; depreciation of 3.5% and operation and maintenance of 1% on the lateral. *Michigan Wisconsin Pipe Line Company, et al.*, 21 F.P.C. 552, 558, fn. 5 (1959).

[4] Cf. *Interstate Commerce Commission* v. *Oregon-Washington R. and Nav. Co.*, 288 U.S. 14 (1933); *Central West Utility Co.* v. *Federal Power Commission*, (3rd Cir. 1957) 247 F. 2d 306.

ice under the ACQ-1 Rate Schedule to the extent necessary to assure Petitioner a 6.5 per cent rate of return in the third year of gas operations in the Upper Peninsula or provide an off-setting rate differential. Petitioner's application for rehearing was denied by the Commission's order of December 29, 1959 with a detailed discussion of the considerations involved (R. 428-446).

Upon Petitioner's petition for review under Section 19(b) of the Natural Gas Act, the Court of Appeals for the District of Columbia Circuit affirmed the order of the Commission (Pet. App. 1a-5a, 1b). The Court concluded after reviewing the record that it was obvious that either of Petitioner's proposals "would unduly discriminate in its favor, and would impose an undue burden upon the other customers of Michigan Wisconsin." The Court further found adequate support in the record for the Commission's findings and concluded that the Commission had properly exercised its judgment (Pet. App. 5a). Petitioner's petition for rehearing en banc was denied by the full Court (Pet. App. 1c).

ARGUMENT

1. Petitioner asks this Court to grant certiorari to consider the question whether the responsibility of the Federal Power Commission under Section 4(b) of the Natural Gas Act prohibiting undue discrimination is properly discharged when, "*in the presence of such discrimination*," the Commission does not itself devise means for its elimination (Pet. 2).[5] This is a purely contrived and hypothetical question which is not presented or involved in this case.

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[5] Italics are supplied throughout this brief unless otherwise indicated.

Petitioner's "question" rests upon the premise that the Commission sanctioned discrimination when it directed Michigan Wisconsin to deliver gas to Petitioner at Menominee under Michigan Wisconsin's uniform system-wide ACQ-1 Rate Schedule. But the Commission specifically concluded that deliveries to Petitioner at that point and under those conditions would *not* discriminate against Petitioner, and conversely that Petitioner's demands for more favorable treatment would result in discrimination against Michigan Wisconsin's other customers. The Commission expressly found, contrary to Petitioner's statements in its petition for certiorari, that:

> "* * * providing for purchases by Michigan Gas under the ACQ-1 Rate Schedule and construction by it of the necessary Upper Peninsula facilities does *not* discriminate against that company" (R. 376).[6]

The Commission further found that the additional concessions demanded by Petitioner, "far from curing any claimed discrimination, would themselves lead to undue discrimination against Michigan Wisconsin's other customers" (R. 436). And, the Court below likewise concluded that:

> "It is obvious that either of the proposals of Michigan Gas would unduly discriminate in its favor, and would impose an undue burden upon the other customers of Michigan Wisconsin" (Pet. App. 5a).

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[6] In its petition for certiorari, Petitioner represented that "the Commission did not deny that this direction resulted in unlawful discrimination against the Upper Peninsula" (Pet. 10). This statement cannot be reconciled with the Commission's express finding quoted above.

Petitioner's "Question Presented" thus assumes that Michigan Wisconsin's proposal to deliver gas for Upper Peninsula service at Menominee was discriminatory and required revision to eliminate the discrimination. The fact is, however, that the Commission found that Michigan Wisconsin's proposal was fair and equitable to Petitioner and, accordingly, was never faced with the problem of devising means to eliminate discrimination (R. 435).

Neither the Commission nor the Court below even remotely held or assumed that the Commission's responsibility to eliminate discrimination is limited to the proposals made by the parties. That question was neither reached nor considered because both the Commission and the Court found that Michigan Wisconsin's proposal to deliver the gas at Menominee was non-discriminatory to begin with. Petitioner's charge that the Commission and Court both "committed blatant error" (Pet. 10) is thus untrue and irresponsible.

While the petition for certiorari for the most part simply assumes that the Commission approved a discriminatory plan of service,[7] Petitioner argues the existence of such alleged discrimination under Point 3 of its petition (Pet. 14-16). Here again, however, Petitioner does not challenge the sufficiency of the evidence to support the Commission's contrary finding but simply asserts that the existence of unlawful discrimi-

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[7] The argumentative device of assuming the major premise of the question presented is indicated by such statements as "the unlawful discrimination thus *inherent* in Mich Wis' proposal" (Pet. 9); "the Commission's direction . . . *patently* resulted in unlawful discrimination" (Pet. 16); "the unlawful discrimination *inherent* in requiring Michigan Gas to pay for gas . . at Menominee" (Pet. 18).

nation is "clear under the Commission's own precedents" (Pet. 14). Petitioner then proceeds with its argument as if it were merely supplying information to explain an obvious conclusion.

The fact is, of course, that the same arguments were made by Petitioner on this precise point before both the Commission and the Court below and, after thorough consideration, were rejected by both. Petitioner now repeats those arguments in its petition for certiorari despite the fact that it has not challenged the sufficiency of the evidence to support the Commission's findings, the adequacy of those findings, or the Commission's competence to decide the question of discrimination. Nor has Petitioner contended that the Court of Appeals erred in affirming the Commission's decision. Petitioner is thus in the anomalous position of asking this Court to *assume*, contrary to the conclusions of both the Commission and Court below, that the Commission's order sanctioned discrimination against Petitioner despite the fact that no review of these conclusions has been sought in this Court.

It is idle for Petitioner to repeat truisms as to the significance of Section 4(b) of the Natural Gas Act and the importance of preventing discrimination (Pet. 11-12). Indeed, the Commission fully recognized and properly discharged its responsibilities in that regard when it rejected Petitioner's demands for further concessions on the ground that they were discriminatory against Michigan Wisconsin's other customers. Few would disagree with the proposition raised by Petitioner in its "Question Presented" that, when confronted with discrimination, the Commission's responsibility to eliminate that discrimination is not limited

or measured by the suggestions of the parties. Here, however, the Commission's order approves a plan of service that it specifically found was non-discriminatory. Certainly the Commission is not required to devise means of eliminating discrimination which it expressly finds does not exist.

2. While Petitioner has not asked this Court to review the question of the sufficiency of the evidence to support the Commission's findings nor alleged any abuse of discretion, Michigan Wisconsin feels it appropriate to comment briefly on the claim—rejected by the Commission and the Court below—that Michigan Wisconsin's proposal to provide gas for Upper Peninsula service at Menominee under its ACQ-1 Rate Schedule discriminated against Petitioner.

First, it should be recognized that such a controversy is not, in practical fact, between the pipeline company and the distribution company seeking to serve a new area but between the distribution company and the other customers of the pipeline. Here, for example, Michigan Wisconsin would necessarily have recovered the cost of constructing and operating the additional facilities demanded by Petitioner by filing increased rates reflecting the additional $4,455,950 investment and related cost of service. Those increased rates would, of course, be paid by existing customers of the pipeline and the consumers they serve.[8]

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[8] Petitioner makes a frankly *ad hominem* argument as to the importance of low cost natural gas to the Upper Peninsula (Pet. 3-5, 12-14). This argument, while relevant, ignores the other side of the equation, namely, the effect upon consumers in other areas served by the pipeline of the increased rates needed to permit below-cost service to the new area. This is the very judgment the Commission is called upon to make and, in fact, made in this case.

The question, therefore, is not one involving either an increase or reduction in the pipeline's profits but how much of a subsidy existing customers of a pipeline should be asked to contribute in order to permit the extension of natural gas service into new and remote areas. Here, Michigan Wisconsin proposed in its certificate application to construct facilities costing $2,377,194 specifically for Upper Peninsula service, representing the increased cost of the pipeline to Menominee required to transport the Upper Peninsula gas to that point. Petitioner demanded a further subsidy of $4,455,950 in the form of additional pipeline facilities north of Menominee, or an equivalent rate differential.

After hearing and considering all of the evidence the Commission, following the recommendation of its Staff, concluded that public convenience and necessity would be served by Michigan Wisconsin's constructing the facilities required to make gas for the Upper Peninsula available at Menominee at the system ACQ rate but that any additional subsidy, as demanded by Petitioner, would discriminate against Michigan Wisconsin's other customers.

It is obvious that questions of undue burden and discrimination involve, to a unique degree, the exercise of judgment and discretion lodged in the Commission by the Natural Gas Act. In a case raising similar issues, the Court below had noted that:

> "These matters are properly for the Commission, and its determination is to be disturbed for only the most basic forms of abuse." *Battle Creek Gas Company* v. *Federal Power Commission*, 281 F. 2d 42, 46 (1960).

Moreover, since the issues posed in the proceeding before the Commission involve public convenience and necessity, this Court's statement in *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 65 (1945) is particularly pertinent:

> "Public convenience and necessity is not defined by the statute. The nouns in the phrase possess connotations which have evolved from the half-century experience of government in the regulation of transportation. * * * The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor service would serve public convenience and necessity. [Citation] This, of course, gives administrative discretion to the Commission, cf. *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87, 88, to draw its conclusion from the infinite variety of circumstances which may occur in specific instances. * * *"

The basis of Petitioner's claim of discrimination here, as before the Commission and the Court of Appeals, is the Commission's refusal to apply Michigan Wisconsin's so-called "10-cent formula" to Petitioner's request for service for the Upper Peninsula (Pet. 14-16). This matter was thoroughly considered by the Commission and by the Court below, both of which found that the 10-cent formula has no application to large projects involving the construction of extensive transmission facilities to serve new areas but was simply a rule of thumb applied in testing the economic feasibility of short laterals off the existing pipeline (Pet. App. 3a). Petitioner has not contended that that conclusion is not supported by substantial evidence or was otherwise beyond the Commission's competence to decide.

Petitioner also claims here, as it did before the Commission and the Court below, that Michigan Wisconsin's proposal to provide city gate service to certain communities in the area traversed by its new trunk line in central Wisconsin is inconsistent with its proposal to supply gas to Petitioner at Menominee (Pet. 15-16). In Opinion No. 331 the Commission pointed out, however, that "there are very material differences between that project and the proposal for service to the Upper Peninsula" and explained those differences in detail (R. 376-377). In denying rehearing, the Commission again referred to "the numerous differences between the two proposals fully discussed in Opinion No. 331, including differences of geographic location, relative market stability, comparative growth potentials and other factors" (R. 436-437). Discrimination consists in different treatment under the same or similar circumstances. Where the circumstances are widely different, different treatment is not only justified but required.

In this case the Commission, having weighed all the factors surrounding service to the Upper Peninsula, found that it was necessary and desirable in the public interest to direct Michigan Wisconsin to deliver gas to Petitioner at Menominee at Michigan Wisconsin's system-wide rate; that no discrimination either for or against Petitioner or Michigan Wisconsin's other customers would result therefrom; and that the adoption of Petitioner's proposals would place an undue burden upon Michigan Wisconsin and its other customers. The record amply supports those determinations. Indeed, neither here nor in the Court below has Petitioner contended that the Commission abused its discretion or acted without substantial evidence.

3. In addition to the contention that there is no discrimination against Petitioner under the Commission's order, Michigan Wisconsin pointed out in the Court below that Petitioner cannot properly raise the issue of discrimination under the circumstances here presented. While that Court found it unnecessary to pass on this contention, it provides another reason why the petition for certiorari should be denied.

Petitioner's claim of discrimination is based on the assumption that it had an absolute right to service from Michigan Wisconsin. Starting from the premise that it was entitled as of right to purchase gas from Michigan Wisconsin for Upper Peninsula service, Petitioner then claims discrimination as to the terms and conditions upon which the Commission found that such service should be provided. But Petitioner's contention ignores the fact that Section 7(a) of the Act, under which the Commission ordered the service (R. 395), expressly provides that the Commission may direct a natural gas company to extend its facilities and sell gas to a distribution company only "if the Commission finds that no undue burden will be placed upon such natural-gas company thereby."

Here, the Commission found that service to Petitioner under its proposals would place an undue burden upon Michigan Wisconsin and its other customers and that service to Petitioner under those conditions would not be necessary or desirable in the public interest. If the Commission had stopped at that point, therefore, Petitioner would simply have been denied service as not having satisfied the statutory requirements of Section 7(a). However, the Commission further found that the sale of gas to Petitioner at Menomi-

nee under the ACQ-1 Rate Schedule would not place an undue burden on Michigan Wisconsin and would be in the public interest. It was only on that basis that the Commission was able to find the service necessary or desirable in the public interest under the standards of Section 7(a).

Petitioner's claim of discrimination cannot properly arise because its only right to service from Michigan Wisconsin is expressly dependent upon Petitioner's purchasing gas at Menominee under Michigan Wisconsin's ACQ-1 Rate Schedule. Accordingly, if Petitioner's theory were adopted that Michigan Wisconsin must construct additional facilities in the Upper Peninsula in order to avoid discrimination, the Commission would have to deny service to Petitioner entirely since the Commission has already found under Section 7(a) that such a requirement would place an undue burden upon Michigan Wisconsin and its other customers.

In sum, Petitioner cannot rely upon an order of the Commission under Section 7(a) as the source of its right to service from Michigan Wisconsin and at the same time ask the Court to set aside the conditions upon which the Commission found such service to be necessary or desirable in the public interest.

CONCLUSION

This petition does not even remotely meet the standards for granting certiorari. The order involved represents a routine exercise of the administrative judgment which is expressly vested in the Commission by the Natural Gas Act. Upon review of the record and careful consideration of Petitioner's contentions, the Court below found that the Commission's judgment

was appropriate and supported by the evidence. The petition for certiorari should be denied.

Respectfully submitted,

CHARLES V. SHANNON
LOUIS FLAX
May, Shannon and Morley
1700 K Street, N.W.
Washington 6, D. C.
Attorneys for Michigan Wisconsin Pipe Line Company

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